Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CAMERON MICHAEL MILLER,
Petitioner

V.

THE STATE OF TEXAS

On Petition For Writ of Certiorari
To The Court of Appeals for the Sixth District
of Texas at Texarkana

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WAS THE PROSECUTOR'S JURY ARGUMENT, WHICH PETITIONER TIMELY OBJECTED TO, AN IMPROPER COMMENT ON PETITIONER'S FAILURE TO TESTIFY IN VIOLATION OF PETITIONER'S RIGHT AGAINST SELF-INCRIMINATION AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

2. DID PETITIONER RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION IN LIGHT OF DEFENSE COUNSEL'S FAILURE TO EFFECTIVELY CROSS-EXAMINE THE STATE'S WITNESSES, AND DEFENSE COUNSEL'S FAILURE TO REQUEST AN ACCOMPLICE WITNESS INSTRUCTION AS TO ONE OF THE STATE'S TWO KEY WITNESSES AGAINST PETITIONER?

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IN THE

Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner respectfully prays that a *writ of certiorari* issue to review the judgment below.

The opinion of the Court of Appeals for the Sixth District of Texas at Texarkana, the highest state court to review the merits, appears at Appendix "A" to the petition and is unpublished.

The notice of the Texas Court of Criminal Appeals refusing petition for discretionary review appears in Appendix "B" to the petition.

JURISDICTION

The date on which the Court of Appeals for the Sixth District of Texas at Texarkana decided this case was November 16, 1999. A copy of that decision appears at Appendix "A". A timely petition for discretionary review to the Texas Court of Criminal Appeals was refused on March 22, 2000, and a copy of the notice refusing discretionary review appears at Appendix "B". No motion for rehearing was filed in this case.

An extension of time to file the petition for a writ of certiorari was granted to and including July 20, 2000 on June 26, 2000 in Application No. 99A1068.

The jurisdiction of this Court is invoked under 28

U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST., Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST., Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. CONST., Amendment XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Proceedings Below

Cameron Michael Miller ("Petitioner") was indicted for the capital murder of Lindsey Loree Williams. Petitioner was convicted on his plea of not guilty in a trial before a jury and automatically sentenced to life confinement in the Institutional Division of the Texas Department of Criminal Justice.

Petitioner appealed to the Court of Appeals for the Fifth District of Texas at Dallas. Petitioner's case was then transferred to the Court of Appeals for the Sixth District of Texas at Texarkana. Petitioner argued, *inter*

alia, that the prosecutor's jury argument, which Petitioner timely objected to at trial (RR6: 182), was a comment on Petitioner's failure to testify and violated Petitioner's right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. (*See* Appellant's Brief: 14-17). Petitioner also argued on appeal that he was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, because his defense counsel provided ineffective cross-examination, and failed to request a jury instruction on the law of accomplice witness testimony in regard to one of the two key witnesses in the case. (Appellant's Brief: 2-11).

The Court of Appeals affirmed the trial court's judgment on November 16, 1999. A copy of the opinion is attached hereto as Appendix "A". No motion for rehearing was filed. Petitioner raised these same two arguments in a petition for discretionary review to the Texas Court of Criminal Appeals. (Appellant's Petition for Discretionary Review: 2-12, 14-17). Said petition was refused on March 22, 2000. (Appendix "B").

Petitioner timely filed an application for an extension of time within which to file a petition for a writ of certiorari in this Court. Said application was granted on June 26, 2000, extending the time for filing this petition to and including July 20, 2000.

B. Statement of the Facts

The indictment alleged in pertinent part that Petitioner on July 14, 1997, did

unlawfully then and there knowingly and

> intentionally cause the death of LINDSAY LOREE WILLIAMS, an individual, hereinafter called deceased, by shooting said LINDSAY LOREE WILLIAMS with a firearm, and the defendant intentionally did cause the death of the deceased while the said defendant was in the course of committing and attempting to commit the offense of kidnapping of LINDSAY LOREE WILLIAMS ...

(CR: 2).[1]

The evidence shows that Petitioner was 16 years old at the time of the offense. (RR5: 64). On the night of the offense, Rachel Banks drove Petitioner and Shawn Tutton to an apartment complex to purchase some marijuana. (RR5: 37). Petitioner gave money to the complainant's boyfriend, Josh, for the purchase of marijuana. (RR5: 37, 65). When Josh did not return with the marijuana, Petitioner and his companions believed that Josh had absconded with the cash. (RR5: 47, 69). Therefore, they kidnapped the complainant, took her to Carson Anderson's home, interrogated her as to Josh's whereabouts, and tried to decide what to do next. (RR5: 37-42, 67). An accomplice, John Harris, testified that during that interrogation, he saw Petitioner shoot Williams. She was shot multiple times in the head and three times in the body. (RR6: 18). Then, Petitioner, Cary

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[1] The record will be cited as follows: CR for Clerk's Record; RR1 for Reporter's Record, Volume 1 of 7; RR2 for Reporter's Record, Volume 2 of 7; RR3 for Reporter's Record, Volume 3 of 7; RR4 for Reporter's Record, Volume 4 of 7; RR5 for Reporter's Record, Volume 5 of 7; RR6 for Reporter's Record, Volume 6 of 7; and RR7 for Reporter's Record, Volume 7 of 7.

Miller, Kermit Anderson, and co-defendant John Harris, wrapped the complainant's body in sheets and plastic bags and dropped it into a lake, where it was found about several weeks later. After questioning the members of the group, police searched Anderson's home, where they found a number of guns and also found, in the room where the victim was said to have been shot, blood spatters that matched the victim's blood type.

Petitioner did not testify at his trial. (RR6: 159). The trial court gave the appropriate instruction to the jury. (CR: 109). The following occurred during the prosecutor's closing argument in the guilt-innocence phase of the trial:

> [W]e all talked about a fair trial. And that's the judge's role in this trial. Judge of the law to make sure things move on, are proceeded on properly and questions of law and to make sure that [Petitioner], maybe 16 years old in age, or looks young, gets a fair trial. And I'd submit to you he has. Judge Greene has seen to that.
>
> But the law also talks about a fair trial for some other people. Lindsay Williams and her mother and her father and her grandparents and her sister are entitled to the same thing; *who have had to sit here through this trial and listen, not to a 16 year-old.* Because this is a classic case, I'll submit to you -- remember all those questions in jury selection about looks?
>
> [DEFENSE COUNSEL:] Your Honor, we object to the argument of counsel in that -- the references which he

just made to the failure of the defendant to testify, and at this time I would ask for a mistrial.

THE COURT: Overruled.

(RR6: 182 (emphasis added); Appellant's Brief: 14; Appellant's Petition for Discretionary Review: 13)

The jury found Petitioner guilty of capital murder and he received an automatic life sentence. (RR6: 194-195).

QUESTION NO. 1

WAS THE PROSECUTOR'S JURY ARGUMENT, WHICH PETITIONER TIMELY OBJECTED TO, AN IMPROPER COMMENT ON PETITIONER'S FAILURE TO TESTIFY IN VIOLATION OF PETITIONER'S RIGHT AGAINST SELF-INCRIMINATION AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

REASONS FOR GRANTING THE PETITION

The Court of Appeals for the Sixth District of Texas at Texarkana, a state court, has decided an important federal question in a way that conflicts with relevant decisions of this Court, to wit: *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

The Texarkana Court of Appeals held that the trial

court did not err in overruling Petitioner's objection to the prosecutor's jury argument. (Appendix A - p. 7). The court stated that the prosecutor's comment was not "of such a character that a jury would necessarily take it as a comment on [Petitioner's] failure to testify." (Appendix A - p. 7). This ruling is in conflict with this court's decision in *Griffin v. California, supra.*

The fifth amendment prohibits a prosecutor from commenting directly or indirectly on a defendant's failure to testify. *Griffin v. California, supra.* Such a comment has been held violative of the self-incrimination Clause of the Fifth Amendment which is made applicable to the States by virtue of the Fourteenth Amendment. *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Such a comment is a basis for reversal only where it is "of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States v. Bright,* 630 F.2d 804, 825 (5th Cir. 1980).

The prosecutor's argument to the jury in the instant case was such that the jury would naturally and necessarily construe it as a comment on Petitioner's failure to testify. The prosecutor argued that the complainant's family members "have had to sit here through this trial *and listen, not to a 16 year-old.*" Petitioner was the 16 year-old that did not testify in the trial. This was clearly a comment on Petitioner's failure to testify in violation of the Fifth and Fourteenth Amendments, U.S. CONST. amend. V; U.S. CONST. amend. XIV, and the Texarkana Court of Appeals erred in holding otherwise.

QUESTION NO. 2

DID PETITIONER RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION IN LIGHT OF DEFENSE COUNSEL'S FAILURE TO EFFECTIVELY CROSS-EXAMINE THE STATE'S WITNESSES, AND DEFENSE COUNSEL'S FAILURE TO REQUEST AN ACCOMPLICE WITNESS INSTRUCTION AS TO ONE OF THE STATE'S TWO KEY WITNESSES AGAINST PETITIONER?

REASONS FOR GRANTING THE PETITION

The Court of Appeals for the Sixth District of Texas at Texarkana, a state court, has decided an important federal question in a way that conflicts with relevant decisions of this Court, to wit: *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984).

The Texarkana Court of Appeals held that defense counsel was not ineffective in their his cross-examination of the witnesses (Appendix A - pp. 3-4), or for failing to request an accomplice witness instruction in regard to Rachel Banks. (Appendix A - p. 5). This ruling is in conflict with this court's decision in *Strickland v. Washington, supra.*

In *Strickland,* this Court set out a two-prong test for the evaluation of ineffective assistance of counsel claims. First, Petitioner must show that his counsel

rendered ineffective assistance in that counsel made unprofessional errors such that counsel was not functioning effectively on his client's behalf. Second, Petitioner must show that he was prejudiced by his counsel's substandard performance. Prejudice must rise to the level sufficient to undermine the confidence in the outcome of Petitioner's trial. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. The constitutional right to counsel does not mean errorless counsel or counsel whose competency is judged by hindsight. *Doherty v. State,* 781 S.W.2d 439, 441 (Tex.App.—Houston [1st Dist.] 1989, no pet.). Rather, the right means counsel reasonably likely to render reasonable assistance. *Id.* A reviewing court must presume adequate assistance and that all significant decisions were made in the exercise of reasonable professional judgment. *Strickland,* 466 U.S. at 690, 104 S.Ct. at 2066.

Thus, to obtain a reversal on ineffective assistance of counsel, Petitioner must show that (1) counsel's performance was so deficient that he was not functioning as the counsel guaranteed by the Sixth Amendment; and (2) there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 695, 104 S.Ct. at 2064. This standard does not require that Petitioner be found not guilty or assessed a lenient punishment absent counsel's error. *See Doherty,* 781 S.W.2d at 442. Rather, according to *Strickland,* there must be a reasonable probability of a different result; that is, a probability sufficient to undermine confidence in the outcome. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068.

This Court has recognized that there are circumstances that occur during trial that are so likely to

prejudice an accused that the cost of litigating their effect is unjustified. *United States v. Cronic,* 466 U.S. 648, 658, 104 S.Ct. 2039, 2046 (1984). In the case at hand, Petitioner's defense counsel provided ineffective cross-examination, and failed to request a jury instruction on the law of accomplice witness testimony in regard to Rachel Banks. First, defense counsel's cross-examination bolstered, rather than challenged, the prosecution witnesses by emphasizing harmful evidence of the State's case. During the cross-examination of State's witness Rachel Banks, defense counsel emphasized her direct testimony. (*See* RR5: 68-70, 72-74, 82-83 *and compare with* RR5: 35-64). State's witness David Taylor testified of the items and exhibits found in the house which was the location of the offense. (RR5: 112-138). Taylor testified that there were 31 weapons found at the location. (RR5: 115). On cross-examination defense counsel emphasized the weapons found. (RR5: 142-143). State's witness John David Harris was a co-defendant in this capital murder case. (RR6: 74). He gave very damaging and inculpating evidence against Petitioner on direct examination. (RR6: 76-114). On cross-examination defense counsel bolstered the State's case by reemphasizing the exact same testimony. (RR6: 121-125, 128-129, 134-135). Such conduct was a denial of Petitioner's right to effective assistance of counsel.

Moreover, Petitioner's defense counsel failed to request a jury instruction on the law of accomplice witness testimony in regard to Rachel Banks. Banks testified that she drove her grandmother's Mercury Sable to the apartment complex where the complainant was abducted by Banks, Shawn and Petitioner. (RR5: 39-41). Banks drove the car to Petitioner's house. (RR5: 41).

Banks then drove the complainant to Carson's house, while Petitioner, John and Shawn rode in John's BMW. (RR5: 42-43). When they arrived at Carson's house, Rachel stayed in her car with the complainant. (RR5: 46). Five minutes later Rachel took the complainant inside the house. (RR5: 47). Later Rachel and the complainant stayed together, which Shawn and Carson left to look for Josh. (RR5: 50). Although Banks had not been indicted for capital murder or kidnapping, she helped in the kidnapping of the complainant by restraining her and by moving the complainant from place to place in her vehicle. One who participates with the defendant before, during or after the commission of the crime for which the defendant is on trial is an accomplice as a matter of fact. *Ex parte Zepeda,* 819 S.W.2d 874 (Tex.Crim.App. 1991). Rachel Banks was an accomplice as a matter of fact.

Aside from the accomplice testimony from Rachel Banks and John David Harris, none of the other evidence in the case tended to connect Petitioner to the commission of the murder. Defense counsel should have requested an instruction on the law of accomplice witness testimony in regard to Rachel Banks. This omission was an error rendering defense counsel's performance deficient. Had the jury been informed that it could not convict Petitioner without corroboration of the testimony of Rachel Banks and John David Harris, in light of the remaining evidence presented, there is a reasonable probability a rational jury would not have convicted Petitioner. *See Voyles v. Watkins,* 489 F.Supp. 901 (N.D. Miss. 1980) (failure to request instruction that prosecuting witness' testimony as alleged accomplice be viewed with caution and suspicion was inexcusable).

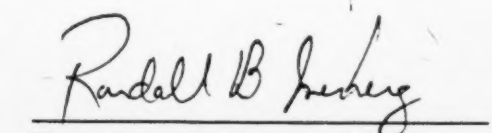
Clearly, defense counsel's representation fell

below an objective standard of reasonableness. Defense counsel's errors were sufficient to undermine confidence in the outcome of Petitioner's trial. The performance of counsel failed to meet the standard of reasonably effective assistance of counsel established by this Court in *Strickland v. Washington, supra.* Thus, Petitioner was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, and the Texarkana Court of Appeals erred in holding defense counsel was not ineffective.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a *writ of certiorari.*

Respectfully submitted,



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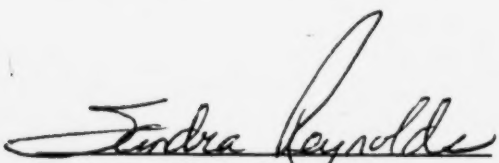

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APPENDIX "A"

The State of Texas

In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-98-00310-CR

CAMERON MICHAEL MILLER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 282nd Judicial District Court
Dallas County, Texas
Trial Court No. F98-18507-MS

Before Cornelius, C.J., Grant and Ross, JJ.
Opinion by Chief Justice Cornelius

OPINION

Cameron Miller appeals from his conviction in a jury trial for capital murder. He was sentenced to life imprisonment. On appeal, he contends that he was denied his constitutional right to effective assistance of counsel, that the trial court made various errors in ruling on his objections to evidence and to the State's jury argument, and that the evidence is legally insufficient to support his conviction.

The evidence shows that Miller gave the victim, Lindsay Williams, money to purchase marihuana. She gave the money to her boyfriend Josh, who then left. Miller and his companions believed that Josh had absconded with the cash. The victim went with Miller and the others to the home of one of his companions, Carson Anderson, while they tried to decide what to do next. An accomplice, John Harris, testified that he saw Miller shoot Williams. She was shot multiple times in the head and three times in the body. They wrapped her body in plastic bags and sheets and dropped it into a lake, where it was found about six weeks later. After questioning the members of the group, police searched Anderson's home, where they found a number of guns and also found, in the room where the victim was said to have been shot, blood spatters that matched the victim's blood type.

We first address Miller's contention that he did not have effective assistance of counsel at his trial. The standard for testing claims of ineffective assistance of counsel is set out in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and was adopted for Texas constitutional claims in *Hernandez v. State,* 726 S.W.2d 53, 57 (Tex.Crim.App. 1986). Miller

must first show that his counsel's representation was deficient. He then must show that the deficient performance was so serious that it prejudiced his defense. In other words, Miller must prove by a preponderance of the evidence that his counsel's representation fell below the standard of prevailing professional norms and that there is a reasonable probability that, but for the deficiency, the result of the trial would have been different. *McFarland v. State,* 845 S.W.2d 824, 842 (Tex.Crim.App. 1992). Under this standard Miller must prove that his counsel's representation so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland v. Washington,* 466 U.S. at 686.

The review of counsel's representation is highly deferential, and we indulge a strong presumption that his conduct falls within a wide range of reasonable representation. *Strickland v. Washington,* 466 U.S. at 689. Miller has the burden to overcome that presumption by identifying the acts or omissions of counsel that are alleged to have constituted the ineffective assistance and then affirmatively proving that they fell below the professional norm for reasonableness. *Jackson v. State,* 973 S.W.2d 954 (Tex.Crim.App. 1998). Then Miller must prove that counsel's errors, judged by the totality of the representation, denied him a fair trial. Merely showing that they had some conceivable effect on the proceedings is inadequate. *Strickland v. Washington,* 466 U.S. at 693.

Miller contends that counsel was ineffective because he failed to object to extraneous offense testimony, failed to object to inadmissible hearsay, and failed to request an accomplice witness charge, all in connection with the testimony of Rachel Banks. He also

argues that his counsel did not effectively cross-examine some witnesses.

Miller first complains about testimony by Banks that Miller and Shawn Tutton had gotten together to buy some marihuana, and that they were angry and cursing because they did not get the drugs. He argues that his counsel should have objected to this testimony. Miller argues that this testimony was inadmissible because it was evidence of an extraneous bad act. We do not agree that the testimony was inadmissible. Although testimony about other crimes or bad acts is inadmissible to show character, TEX. R. EVID. 404(b) specifically provides that such testimony may be admissible for other purposes. The testimony of which Miller complains was relevant because it shows the context of the offense. It explains the background of the murder, explains why the victim was with Miller, and also shows the motivation for the murder. It is not error for counsel to fail to object to admissible evidence. *See Molinar v. State,* 910 S.W.2d 572, 579 (Tex.App.—El Paso 1995, no pet.).

Miller also contends that counsel's cross-examination was ineffective. He bases this claim in part on counsel's cross-examination of a State's witness, David Taylor, stating that he unnecessarily brought out details about each of thirty-one firearms police found in the house. First, we note that counsel did not elicit the details about all of the guns, but he did elicit information about the pistols found in the house, and that they included two .22 caliber automatics. Williams was killed by shots fired from a .22. The purpose of the questioning is not stated, but counsel could have been attempting to lay the groundwork for a claim that one of the others in the house also had access to firearms of the same caliber

as the murder weapon, thus indicating that some other person might be attempting to shift the blame for the murder to Miller. In addition, the house was not Miller's home, but was the home of one of his juvenile friends, Carson Anderson. Thus, the fact that multiple firearms were found at that location could not be harmful to Miller's defense. Indeed, counsel also elicited testimony that there were others playing with the guns, and that Anderson actually fired two of them through a wall while in the room with Rachel Banks.

Miller also suggests that counsel's cross-examination of Banks was harmful because it only emphasized the testimony she gave on direct examination. In the complained-of-testimony Banks testified about two others in the group with Miller, that they also had weapons on the night Williams was killed, that one of them had a BMW that they used for transportation, and that one of those individuals assisted in disposing of Williams' body. Although this evidence might have been harmful in some way to Miller, it does show an attempt to shift blame for the killing to another of the group rather than Miller. Counsel's representation in these respects was not ineffective.

Miller also argues that his counsel was ineffective for failing to object on hearsay grounds to the following portion of Banks' testimony. In response to a question asking whether Banks' boyfriend, Shawn Tutton, who along with Banks came out of the house after the shooting, had said anything to her while they sat in her car outside the house, Banks answered, "Yes, he told me not to say anything and that nothing that we saw was to go anywhere else. And he said if we did say anything, that Cameron would kill us." From the context of Banks'

testimony, it is clear that Tutton was excited and afraid. Even if an objection had been made, this testimony would have been admissible as an excited utterance, an exception to the hearsay rule. TEX.R EVID. 803(2). Thus, counsel did not render ineffective assistance by failing to object to this admissible evidence.

Miller also contends that his counsel was ineffective because he did not seek an accomplice witness instruction in the jury charge as to Rachel Banks. An accomplice witness is an individual who participated with the accused before, during, or after the commission of the crime for which the accused is on trial. *Brooks v. State,* 686 S.W.2d 952, 957 (Tex.Crim.App. 1985). In a jury trial where there is conflicting evidence about a witness' participation in the offense, whether or not the witness is an accomplice is a matter of fact to be determined by the jury. *Blake v. State,* 971 S.W.2d 451, 455 (Tex.Crim.App. 1998). A person who is merely present at the scene of an offense is not an accomplice; an affirmative act or omission is required. *Blake v. State,* 971 S.W.2d at 454. One is not an accomplice for merely knowing about a crime and failing to disclose it, or even concealing it. *Id.* A critical question is whether the person participated in the crime or can be connected to the criminal offense as a blameworthy participant. *Blake v. State,* 971 S.W.2d at 455.

The evidence does not reflect that Banks was connected to the capital murder. She drove Williams to the house where Williams was eventually killed, but the evidence shows that Williams came willingly and without compulsion, agreeing to stay with them until they found Josh, walking from Banks' car back to a car filled with her friends and telling them to leave without

her. There is no evidence suggesting that Banks was in any way connected with the commission of the murder, and there is substantial evidence to the contrary. The evidence shows that she and Williams came alone in the car, and Banks testified that if Williams had wanted to leave, she would not have tried to stop her. There was testimony that Tutton and Miller wanted to get information from the victim about Josh's location, but that alone is not sufficient to suggest that Banks should have known that they planned to kill Williams. Banks testified that she did not see any use of force against Williams until after they arrived at the house, and that she did not see either Miller or Tutton with a gun until they were inside the house.

In the absence of any evidence that Banks should have anticipated the murder or that would show her complicity in the crime, there was nothing to justify giving an accomplice witness instruction to the jury. Thus, counsel was not ineffective for failing to request such an instruction.

Miller next contends that the court committed reversible error by overruling his hearsay objection to the following testimony by Banks:

> Q. What happened?
> A. Shawn came out of the room.
> Q. And does Shawn say anything?
> A. He said -- he came up the stairs, and -- when we heard the door open, we walked back up the stairs. And when he came up, he said -
> [DEFENSE COUNSEL:] I'll object to hearsay as well, Your Honor.
> [PROSECUTOR:] These were statements

made during the contextural [sic] of what's going on.

THE COURT: Overruled.

Q. Was Shawn excited at this point?

A. Yes.

Q. And what did he say?

A. He said that it's over. She's dead.

Q. Does he make any statement as to who shot her?

A. He said Cameron killed her.

The statement is hearsay. TEX. R. EVID. 801. That does not, however, end our inquiry. TEX. R. EVID. 803(2) permits the admission of such a statement as an excited utterance when it is a statement relating to the startling event, made while the declarant was under the stress of excitement caused by the event. The declarant had just witnessed a murder. That is sufficient to allow admission of Tutton's statement to Banks as an exception to the hearsay rule.

Miller next contends that the court erred by overruling his objection to the following jury argument by the State.

> [W]e all talked about a fair trial. And that's the judge's role in this trial. Judge of the law to make sure things move on, are proceeded on properly and questions of law and to make sure that Cameron Miller, maybe 16 years old in age, or looks young, gets a fair trial. And I'd submit to you he has. Judge Greene has seen to that.
>
> But the law also talks about a fair trial for some other people. Lindsay Williams and her mother and her father

and her grandparents and her sister are entitled to the same thing; *who have to sit here through this trial and listen, not to a 16 year-old.* Because this is a classic case, I'll submit to you -- remember all those questions in jury selection about looks?

[DEFENSE COUNSEL:] Your honor, we object to the argument of counsel in that - - the references which he just made to the failure of the defendant to testify, and at this time I would ask for a mistrial.

THE COURT: Overruled.

(Emphasis added.) The prosecution may not comment on the failure of a defendant to testify, for such a comment violates the privilege against self-incrimination in U.S. CONST. amend. V and TEX. CONST. art. I, § 10. *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *Cockerham v. State,* 729 S.W.2d 742, 746 (Tex.Crim.App. 1987). Such a comment also violates a mandatory statute. TEX. CODE CRIM. PROC. ANN. art. 38.08 (Vernon 1979); *see Montoya v. State,* 744 S.W.2d 15, 34 (Tex.Crim.App. 1987).

In order to constitute a violation, however, the language used must be either manifestly intended as, or be of such character that the jury would naturally and necessarily take it to be, a comment on the defendant's failure to testify. *Cockerham v. State,* 729 S.W.2d at 746.

The comment by the prosecutor here is not obviously intended to refer to the defendant's failure to testify. Moreover, reviewing the statement in the context of the whole argument, we are not persuaded that it is of such a character that a jury would necessarily take it as a comment on Miller's failure to testify. The statement

seems to be more of an attempt to refer to Miller's youthful appearance and age. In the argument following the objection, the prosecutor went on to argue that the actual age or the appearance of Miller was unimportant, and that his proven actions showed that he was evil, a coward, and a cold-blooded killer. The trial court did not err in overruling Miller's objection to this argument.

Miller next contends that the trial court erred by overruling his relevance objection to part of the testimony of John Harris. Before any objection was made, Harris testified that he had been living with Miller for some time, that he lived in one upstairs bedroom, Miller's younger brother stayed in another upstairs bedroom, and Miller's mother and sister shared another upstairs bedroom. In the objected-to portion of his testimony, Harris testified that Miller lived in the larger, downstairs master bedroom. A relevance objection was also made to a question by the prosecutor asking Harris whether it was Miller or his mother who had given him permission to stay at the house. The trial court overruled the objection, and Harris testified that Miller had given him permission to live at the house.

Miller contends that the testimony should not have been admitted, since it was not relevant to any element of the offense and was only offered to inflame the jurors' minds by trying to show that Miller actually ran the household instead of his mother. We disagree. A major defensive theory was that Miller, being only sixteen years old, was not the real killer, partially because both Harris and Banks are several years older. The evidence was relevant to make a fact of consequence to the action more or less probable, that being the question of who was in control on the night of the murder. *See* TEX. R. EVID. 401.

Evidence tending to show that Miller, rather than his mother, was in charge of his household would make it more likely that other, older acquaintances would also defer to his leadership.

Miller next contends that the evidence is legally insufficient to support his conviction. In our review of the legal sufficiency of the evidence, we employ the standards set forth in *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560, 573 (1979), and *Geesa v. State,* 820 S.W.2d 154 (Tex.Crim.App. 1991), and determine whether, after viewing all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Where an accomplice witness' testimony is concerned, the test is whether, after excluding the accomplice's testimony, there is other evidence of an incriminating character that tends to connect the defendant with the commission of the offense. *Burks v. State,* 876 S.W.2d 877, 887 (Tex.Crim.App. 1994); *Munoz v. State,* 853 S.W.2d 558, 559 (Tex.Crim.App. 1993); *Reed v. State,* 744 S.W.2d 112, 125 (Tex.Crim.App. 1988).

John Harris, an accomplice witness, testified that he was present when Miller shot the victim the first time, in the middle of the forehead, and that as he left the room he heard multiple additional shots. Harris then went to a grocery store and bought plastic bags that were used to wrap the victim's body. He testified that they put the body in the trunk of his BMW and drove to a lake, where Miller, his brother Cary Miller, Harris, and Anderson threw the body into the water.

Banks testified that she heard Miller and Tutton questioning the victim, that she heard the first gunshot,

and that Tutton told her that Miller had shot Williams. She also testified that she saw Miller standing near the victim with a gun and that she heard him say, "They won't let me shoot her again," and then heard more gunshots as she and Tutton left the house.

In addition to Banks' testimony, the victim's father testified that Miller had called him after his daughter had been missing for several weeks, but two weeks before she was found, and that Miller told him that he had heard a rumor that her body had been found.

We find the evidence legally sufficient to support the conviction.

The judgment is affirmed.

"s/ William J. Cornelius"
Chief Justice

Date Submitted: November 15, 1999
Date Decided: November 16, 1999
Do Not Publish

APPENDIX "B"

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

March 22, 2000
COA#: 06-98-00310-CR
STYLE: MILLER, CAMERON MICHAEL

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.